UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE M RESORT, LLC d/b/a M RESORT SPA CASINO

and Cases 28-CA-22299

28-CA-22370

BRUCE ALLEN, an Individual

and Case 28-CA-22309

RUSSELL L. SHOCK, JR., an Individual

and Case 28-CA-22310

MICHAEL DeVITO, an Individual

and Case 28-CA-22319

ROMAN MEDINA, an Individual

RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Comes now the Respondent, The M Resort, LLC d/b/a M Resort Spa Casino, pursuant to Section 102.46 of the Board's Rules and Regulations, as amended, and files the following exceptions, within the time permitted, as extended, to the Decision ("ALJD") issued by Administrative Law Judge ("ALJ") Lana H. Parke on November 5, 2009.

I. Respondent excepts to the ALJ's finding that all complaints made by Bruce Allen were concerted and protected. (ALJD, p. 19, lines 4-13). There was no evidence adduced at the hearing that Allen complained in concert with others or that he was speaking on behalf of others. A single employee's safety complaint is not *per se* concerted just because it is of common concern to a group. *Manimark Corp. v. NLRB*, 7 F.3d 547, 551 (6th Cir. 1993). *See*

also Mannington Mills, 272 NLRB 176, 176-77, n. 4 (1987) (distinguishing a situation in which employees authorized a coworker to speak on their behalf from a situation where others did not give authorization); *Reynolds Electric*, 342 NLRB 156 (2004) (no violation where there is no evidence that supervisor knew that employee was acting for others or had spoken with others regarding complaints raised).

- II. Respondent excepts to the ALJ's finding that Maria Tamayo-Soto violated Section 8(a)(1) of the Act by threatening Bruce Allen with termination if he made complaints about working conditions. (ALJD, p. 16, lines 22-31; ALJD, p. 21, lines 17-18). The ALJ based her determination on her claimed "reasonable inference" that Soto's explanation to employees of the reason for Respondent's termination of Alex Carroll that "basically [he] was not happy at all, and it made other officers uncomfortable" was a signal to employees that Carroll was terminated for complaining about working conditions. (ALJD, footnote 11, p. 6, line 49 p. 7, line 41). The ALJ's inference is not reasonable, and it is not grounded in the hearing testimony. It is a strained misinterpretation of Soto's testimony, and without it, the ALJ could not have found that Soto committed the violation of Section 8(a)(1) alleged.
- III. Respondent excepts to the ALJ's *sua sponte* expansion of the Complaint to include an allegation that Anthony Perez committed a violation of Section 8(a)(1) of the Act by his questioning of Bruce Allen. (ALJD, p. 16, line 47 p. 17, line 7; ALJD, p. 17, footnote 35, lines 34-43). Even if the testimony at the hearing and the briefing included analysis of Perez's questioning of Allen, the General Counsel did not move to amend the Complaint in writing or orally at the hearing, and it was improper for the ALJ to find a violation of the Act where no allegation was made.

- IV. Respondent excepts to the ALJ's finding that Anthony Perez committed a violation of Section 8(a)(1) of the act by his questioning of Bruce Allen. (ALJD, p. 17, line 22 – p. 18, line 6; ALJD, p. 21, lines 19-20). Notwithstanding the lack of an allegation that Perez's questioning of Allen constituted a violation, as discussed in Exception III above, it was not coercive. Rather, it was an understandable reaction by an employer who first learned of legal action (here, an EEOC charge and potential class action lawsuit) being taken against it. Respondent's reaction – including contemporaneous assurances from Respondent's Director of Human Resources Doug McCombs that Allen was free to cooperate with the EEOC however Allen saw fit – stands in stark contrast to other situations in which the Board has found a violation. Compare, e.g., NLRB v. ATC LLC, 309 Fed. Appx. 98 (9th Cir. 2009) (finding that interrogation was coercive when employees were threatened with job loss if they did not submit to questioning). Furthermore, the subject of the questioning – another employee's EEOC charge – is not the type of activity which the Board finds to constitute protected activity, because it represents the pursuit of interests that are "individual in nature," not for the mutual aid and protection of all employees. See Hollings Press, Inc., 343 NLRB 301, 302 (2004). Thus, even if the questioning was somehow coercive, it did not violate the act, because the subject matter of the questioning did not implicate activity protected by Section 7. Finally, the ALJ's reliance on Maria Tamayo-Soto's alleged aversion to complaints to support her finding that Perez's questioning of Allen violated the Act (ALJD, p. 17, lines 26-28) is improper for the reasons discussed in Exception II above.
- V. Respondent excepts to the ALJ's conclusion that the General Counsel satisfied his burden under *Wright Line*, 251 NLRB 1083, 1089 (1980), as to Bruce Allen. (ALJD, p. 20, lines 13-15). The ALJ specifically indicates that the General Counsel made a satisfactory

Wright Line showing as to "the four employees' discharges," which surmisably applies to different terminated employees Russell Shock, Roman Medina, Michael DeVito, and Joseph Varner, the four of whose violations had been consistently grouped throughout this case. It appears that the ALJ predicated her Wright Line finding for Allen on the showing made as to the other four employees, which is improper. Even assuming the ALJ intended to find that the General Counsel satisfied his Wright Line burden independent of the showing made as to the other four employees, Respondent excepts. As discussed in Exception I above, Allen did not engage in protected concerted activity. As shown in Exception II above, Maria Tamayo-Soto's actions do not constitute a violation of Section 8(a)(1), and thus cannot form the basis for a showing of union animus. Similarly, as discussed in Exception IV above, Anthony Perez's questioning of Allen does not constitute a violation of Section 8(a)(1), and thus cannot for the basis for a showing of union animus. Therefore, the General Counsel did not meet his burden under Wright Line, and no burden should have shifted to Respondent.

VI. Respondent excepts to the ALJ's finding that it did not meet its shifted burden under *Wright Line* as to the discharge of Bruce Allen, and that it violated Section 8(a)(1) by discharging him. (ALJD, p. 20, line 18; ALJD, p. 21, lines 5-11; ALJD, p. 21, lines 21-22). Even if the General Counsel has met his burden under *Wright Line*, a conclusion which Respondent disputes pursuant to Exception V above, the evidence offered by Respondent shows that it discharged Allen for the ample, non-discriminatory reasons of his violation of Respondent's requirement that he keep the details of its investigation into improper access of personnel files confidential, and the hostile/harassing work environment that Allen created for coworker Michael Murray by making Murray think that he was the target of Respondent's investigation. The Employer had a vital interest in maintaining the

confidentiality of its investigation, which Allen breached. *See Caesar's Palace*, 336 NLRB 271, 272 (2001); *Phoenix Transit System*, 337 NLRB 510, 514 (2002). Respondent held an honest belief that Allen engaged in misconduct that warranted his discharge. *See Pepsi-Cola Co.*, 330 NLRB 474, 474 (2000). The ALJ's finding that "Respondent's true motivation in discharging Mr. Allen...[was his] protected activities" is unsupported.

- VII. Respondent excepts to the ALJ's refusal to consider Respondent's reliance on the hostile environment created by Bruce Allen as a basis for his discharge. (ALJD, p. 19, footnote 40, lines 50-53). An employer must meet a shifted burden in the Wright Line framework by showing that it would have taken the same action against an employee even absent protected activity. An administrative law judge must consider the reasons proffered by an employer for its actions, and she must determine whether those reasons motivated the respondent to terminate the employee, or that the actual reason for the termination was the employee's protected activity. An administrative law judge may find an employer's reason pretextual, but she may not refuse to consider it. If the ALJ had fully and properly considered Respondent's secondary reason for Allen's termination (his creation of a hostile environment for Murray) standing alone and/or in conjunction with the primary reason for his discharge (his breach of the confidentiality of Respondent's investigation), the ALJ should have found that Respondent satisfied its burden. Instead, she refused to consider it. The ALJ's rejection of Respondent's proffered secondary reason for Allen's termination was improper.
- VIII. Respondent excepts to the ALJ's finding that effectuation of the policies of the Act requires that Respondent take any of the actions required by the ALJ's decision, including the reinstatement of Bruce Allen, the provision of back pay to Allen, and the

posting of notices regarding the ALJ's findings that Respondent violated Section 8(a)(1) of the Act by terminating Allen and through the actions of Maria Tamayo-Soto and Anthony Perez. (ALJD, p. 21, line 28 – p. 23, line 9). As shown in Exceptions II, IV, and VI above, Respondent has committed no violations of the Act that require it to take any remedial actions.

Respectfully submitted this 29th day of December, 2009.

/s/ Mark J. Ricciardi
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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2009, I e-filed RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE, filed the necessary service copies with the Office of the Executive Secretary, served a copy of same by email to:

Cornele Overstreet Regional Director National Labor Relations Board Region 28 2600 North Central Avenue, Suite 1800 Phoenix, AZ 85004-3099 cornele.overstreet@nlrb.gov

Joel C. Schochet, Esq. Counsel for the General Counsel National Labor Relations Board Region 28 Alan Bible Federal Building, Suite 400 600 Las Vegas Boulevard South Las Vegas, Nevada 89101 joel.schochet@nlrb.gov

and served a copy of same by overnight mail, following telephone communication, to:

Bruce Allen P.O. Box 116 Meadville, PA 16335

Russell L. Shock, Jr.
936 Coronado Peak Avenue
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(the telephone number on the Board's E-Gov system
for Mr. Shock has been disconnected)

Michael DeVito 1192 Evergreen Cove Street Henderson, NV 89011

Roman Medina 8455 West Sahara Avenue Apt. 217 Henderson, NV 89117

/s/ Brian M. Herman